HAROLD B. WILLEY, C

No. [redacted] 87

In the Supreme Court of the United States

October Term, 1955.

MATILDA HINES, *Petitioner,*

vs.

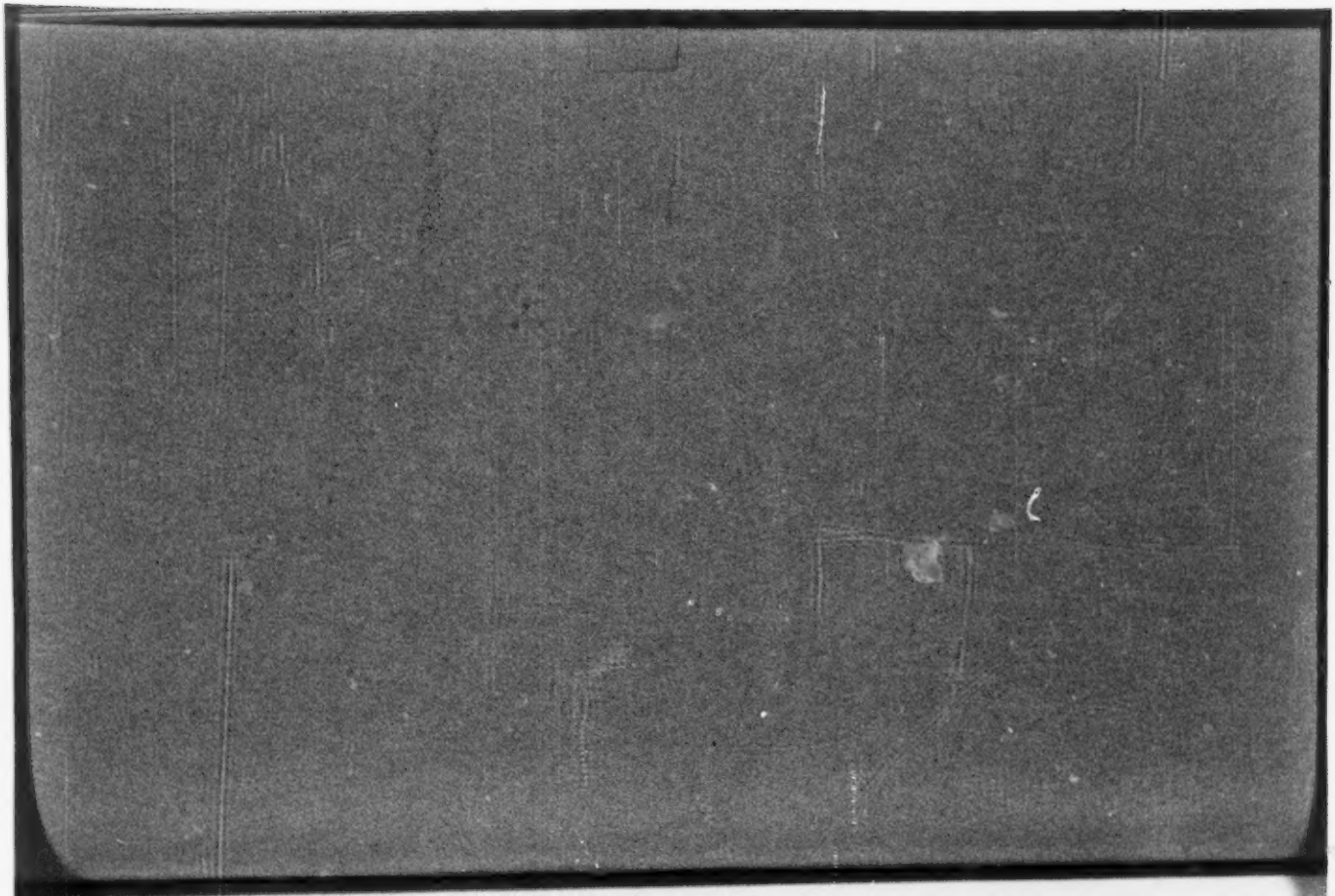
FRED JONES COMPANY, an Oklahoma Corporation, *Respondent.*

PETITION for WRIT of CERTIORARI

To the United States Court of Appeals for the Tenth Circuit.

NEAL E. McNEILL,
1910 First National Building,
Tulsa, Oklahoma,
Counsel for Petitioner.

NEAL E. McNEILL, JR.,
1910 First National Building,
Tulsa, Oklahoma,
Counsel of Record.



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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. .....

MATILDA HINES, ***Petitioner,***

vs.

FRED JONES COMPANY, an Oklahoma Corporation,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
To the United States Court of Appeals for the Tenth Circuit.

Matilda Hines prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on the 3rd day of January, 1956; rehearing denied February 15, 1956.

Citations to the Opinions Below.

The opinion of the Circuit Court of Appeals for the Tenth Circuit is reported in advance sheets, Vol. 1, 229 F. 2d., pages 213-215. The judgment of the Circuit Court of Appeals, omitting caption, is printed in Appendix "A" hereto *infra*, page 19. The Journal Entry of Judgment of the United States District Court for the Northern District, omitting caption, is printed in Appendix "B" attached hereto *infra*, pp. 19-20. Judgment of the Circuit Court of Appeals in denying petition for rehearing, omitting caption, is printed in Appendix "C" attached hereto, *infra*, page 20.

Jurisdiction.

Rehearing was denied February 15, 1956 (R. 20). The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1). Conflict of the opinion with the decisions of this Court, and the several circuits in construing Federal Rule 56 (c) of Civil Procedure following 28 U. S. C. A. Sec. 723 (b) is so definite that uniformity can be secured only by determination from this Court.

The application of Federal Rule 56 (c) of Civil Procedure made by the court below in the opinion applies to and involves all Federal District Courts and Courts of Appeal of the various circuits and is of great nation wide importance in that the controlling question is general and not confined to the litigants in this case.

The jurisdiction is further invoked under Title 28, United States Code, Section 1652. The opinion has decided an important question of local law in irreconcilable conflict with the applicable local decisions of the Supreme Court of Oklahoma and in so deciding has misconstrued Federal Rule 56 (c) of Civil Procedure.

The importance of a decision on the controlling question is general and not confined to the litigants in this particular case.

Questions Presented.

(1) May the trial court on motion for summary judgment, under Federal Rule 56, subsection (c) of Civil Procedure, determine an issue of fact?

(2) May the trial court, on motion for summary judgment, under Federal Rule 56, subsection (c) of Civil Procedure, determine the issue of credibility of witnesses and the weight to be given their testimony?

(3) Upon motion for summary judgment, under Federal Rule 56, subsection (c) of Civil Procedure, the evidence being sufficient to raise the issue of the liability of the car owner upon the theory the driver was the employee of the owner, may the court upon contrary evidence of the driver, an interested witness, weigh the evidence and credibility of said witness and determine said issue of fact?

(4) Has the Court of Appeals in the instant case by basing its decision upon the following statement:

> "The company had no power of direction or control over Wann in doing the work. It had no authority to direct him to do anything. He was free to do the work in any way he saw fit. The company could neither direct him to road test or refrain from road testing the installation;"

which statement and conclusions are unsupported by any evidence or inference to be reasonably drawn therefrom, and without citation of authority, so far departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision?

Rules and Statutes Involved.

Federal Rule 56 (b) and (c) of Civil Procedure, printed in Appendix "D" hereto *infra*, pages 20-21.

Section 22.15, Title 47, Oklahoma Statutes 1951, applicable portion printed in Appendix "E" hereto *infra*, pages 21-22.

STATEMENT.

Petitioner, Matilda Hines, a resident of Eugene, Oregon, while visiting in Tulsa, Oklahoma, on January 7, 1954, was walking across Admiral Place at the intersection of New Haven Avenue at the usual place for pedestrians about 6:30 p. m., when nearing the center of Admiral was struck by a new Lincoln automobile, owned by defendant Fred Jones Company, and driven by Rex Wann, thereby injuring and crippling plaintiff and incapacitating her during the remainder of her life.

GENUINE ISSUES PRESENTED ON BEHALF OF PLAINTIFF.

I.

The defendant, Fred Jones Company, by answer (C. Tr. 21), admits ownership of the automobile. The automobile had been delivered to Rex Wann to install an air conditioner which required the delivery of the automobile, and he was performing that service when he negligently drove the car against the plaintiff causing her permanent injuries (C. Tr. 19). Therefore, there is presented a genuine issue of fact as to whether Wann was the employee of the defendant and acting within the scope of his employment, under the holding in *Ellis & Lewis* v. *Trimble*, 182 Okl. 414, 78 P. 2d 312, wherein it is stated:

> "A party performing work of another at the time of occurrence of injury caused by his negligence is presumed to have been employed by the person for whom he was working and that person has a burden of proving any facts exempting him from liability on the ground that relation of master and servant did not exist."

II.

Fred Jones Company was a licensed new automobile dealer within the purview of Section 22.15, Title 47, O. S. A. 1951 (attached hereto as Appendix "D") (C. Tr. 23), which statute prohibits the operation of the class of automobiles of which the one involved belongs, upon the streets or highways, for private use, or for hire, or without a dealer's plate attached thereto. The car was driven by Rex Wann at the time of the accident, upon the highway without a license plate and for a private use as contemplated by his employment; therefore there is presented a genuine issue of fact

whether Wann was an employee of the defendant and acting within the scope of his employment, under the holding of the Supreme Court of Oklahoma in *Norton* v. *Harmon*, 192 Okl. 36, 133 P. 2d 206, wherein it is stated:

> "Inference raised by dealer's ownership of automobile and by presence on automobile of dealer's license plates, that motorist was acting as employee of owner obtains until such inference is overcome by credible testimony to the contrary."

See also, the following cases cited in *Norton* v. *Harmon*, *supra*, construing statutes similar to Section 22.15, Title 47, O. S. A. 1951, to-wit:

Simmons v. *Brooks*, 63 App. D. C. 293, 72 F. 2d 86, 87, and *Miller* v. *Service and Sales, Inc.*, 149 Ore. 11, 38 P. 2d 995, 997, 96 A. L. R. 628, wherein it is stated:

> "It is presumed that the defendant company, in the use and operation of its automobiles on the highways of this state, would obey the law. Hence it could reasonably be inferred that this car carrying the dealer's license plates was being driven by Erskine on the dealer's business.",

and wherein the court upheld the judgment against the company although it was uncontroverted the car had been loaned to the driver for a purpose not authorized by statute. See also, *Ferris* v. *Sterling*, 214 N. Y. 249, 108 N. E. 406, in an opinion by Justice CARDOZA; and *Frew* v. *Barto*, 245 Pa. 217, 26 Atl. 2d 905, 906.

The burden of proof was thereby placed upon the defendant to prove facts exempting it from liability.

ISSUES PRESENTED ON BEHALF OF THE DEFENDANT.

Defendant's answer (C. Tr. 21-22) admitted ownership of car, denied that Wann was the agent, and as an affirmative defense alleged Wann to be an independent contractor.

Motion (C. Tr. 18) under Federal Rule 56 (b) and (c) of Civil Procedure seeks a summary judgment based solely upon the deposition of co-defendant, Rex Wann, an interested party, taken in a different action formerly pending in the State District Court of Tulsa County, attached to the motion as Exhibit "A" (C. Tr. 18-21). A summary of the testimony in the deposition is attached hereto as Appendix "F," *infra*, pages 22-23, which testimony discloses the company delivered an air conditioner with the automobile to Rex Wann to install the air conditioner (C. Tr. 18). No license plate of any kind was attached to the automobile when delivered (C. Tr. 19). The air conditioner could not be properly installed without driving the automobile on the highway to test the operation of the installation (C. Tr. 20), which practice was one generally used throughout the industry. At the time of the accident Wann was operating the automobile on the highway to road test the installation (C. Tr. 20).

The deposition of C. C. Brann (C. Tr. 22-25), manager of the company, and an interested party, discloses the company was a licensed Lincoln dealer, and if there was a license plate attached to said automobile it would be none other than a dealer's license plate (C. Tr. 23), thus establishing the company to be an automobile dealer within the purview of Section 22.15, Title 47, O. S. A. 1951, and the automobile was one of the class that could not be operated on the highway without a dealer's plate attached thereto, or operated on the highway for a private purpose.

ISSUES PRESENTED UNDER SAID PLEA OF INDEPENDENT CONTRACTOR NOT DETERMINABLE ON MOTION FOR SUMMARY JUDGMENT.

(A) The plea of independent contractor being supported solely by the testimony of interested witnesses, on motion for summary judgment, under Federal Rule 56 (b) and (c) of Civil Procedure, presents an issue of fact for the jury to determine the weight and credibility of witnesses' testimony, under the holding of this Court in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724, and *Sonnentheil* v. *Christian Morlein Brewing Co.*, 172 U. S. 401, 19 S. Ct. 233; and of the Court of Appeals of the District of Columbia in *Miller* v. *Miller*, 122 F. 2d 209, and of the Court of Appeals of the 5th Circuit in *Whitaker* v. *Coleman*, 115 F. 2d 305, and under the holding of the Supreme Court of Oklahoma in *Strahn, et al.*, v. *Murry*, 200 Okl. 640, 199 P. 2d 603, and *National Life Ins. Co.* v. *Robertson*, 180 Okl. 265, 68 P. 2d 796.

(B) There is also presented the following genuine issue of fact as to liability of the defendant company when the defense of independent contractor is interposed, under the following decisions:

(1) The employment of Wann required and contemplated him to drive the automobile upon the highway without a license plate attached thereto, which would constitute a violation of law; therefore the employment was to do an unlawful act under the holding of the Supreme Court of Oklahoma in *M., O. & G. Ry. Co.* v. *Brown*, 41 Okl. 70, 136 Pac. 117, wherein it is held:

> "A person cannot employ another to do for him, as an independent contractor, an unlawful thing, and

thus escape the consequence of the unlawful act when sued for damages occasioned thereby."

(2) See *Minnetonka Oil Co.* v. *Haviland,* 55 Okl. 43, 155 Pac. 217; *Huckins Hotel Co.* v. *Clampitt,* 191 Okl. 190, 224 Pac. 945; *Marion Machine Foundry & Supply Co.* v. *Duncan,* 187 Okl. 160, 101 P. 2d 813, wherein it is held:

> "We think that while the rule is well settled that one, who does work through the instrumentality of an independent contractor, is not liable for damages, caused by the negligent performance of such work by the independent contractor, to third persons except where the work is inherently dangerous or *unlawful.*"

(3) The employment of Wann being oral (C. Tr. 20) and the terms being vague, indefinite and uncertain except that the automobile was delivered to Wann without a license plate attached thereto (C. Tr 18) to install the air conditioner, with no instructions except they wanted him to do a good job, under the holding of the Supreme Court of Oklahoma in *Coston* v. *Adams,* 203 Okl. 605, 224 P. 2d 995, and *Sheppard* v. *Hall,* (Okla., not officially reported) 282 P. 2d 212, there is presented a question of fact for the jury and not for the court.

(4) It being uncontroverted the automobile was delivered to Wann, without a license plate attached thereto, to perform a service that required the operation of the automobile in the condition it was delivered to Wann upon the highway in violation of law and he was so operating the automobile in violation of law at the time of the accident constituted a negligent act and rendered the company liable as a joint tort-feasor under the holding of the Supreme Court of Oklahoma in the following decisions, to-wit:

Indian Territory Illuminating Oil Co. v. *Bell,* 46 P. 2d 481, 173 Okl. 46, where the law applicable to joint tort-feasors is stated as follows:

> "To make tort-feasors jointly liable, there must be some sort of community in wrong doing and injury must be in some way due to their joint working, but they need not be acting together or in concert if their concurring wrongful acts occasion the injury."

Also *Hulett Lumber Co.* v. *Bartlett-Collins Co.,* 206 Okl. 93, 241 P. 2d 379, wherein the court, in syllabus 7, stated as follows:

> "Where separate or independent acts of negligence of several combined to produce directly a single injury, though concert was lacking, each is responsible for the entire result, though his act or neglect alone might not have caused it."

And in the body of the opinion stated as follows:

> "The law is also settled in this jurisdiction that where separate or independent acts of negligence of several combine to produce directly a single injury, although concert is lacking, each is responsible for the entire result, even though his act or neglect alone might not have caused it, and that it is not necessary that they be acting together and in concert, if their concurring negligence occasions an injury. *All American Bus Lines* v. *Saxon,* 197 Okl. 395, 172 P. 2d 424; *Oklahoma Ry. Co.* v. *Ivery,* 201 Okl. 245, 204 P. 2d 978."

The Court of Appeals in its opinion, affirming the judgment of the trial court rendered upon motion for summary judgment, based solely upon the deposition of Wann states and concludes as follows:

> "Even assuming that had the dealer's tag been attached it would have raised a presumption of employer and employee relationship, *that presumption was dissi-*

pated by the uncontradicted evidence before the court, which clearly established that Wann was an independent contractor."

No authorities are cited by the court in the opinion to support said statement and conclusion.

The opinion in holding the evidence of Rex Wann to be an independent contractor concludes and states as follows:

> "The company had no power of direction or control over Wann in doing the work. It had no authority to direct him to do anything. He was free to do the work in any way he saw fit. The company could neither direct him to road test or refrain from road testing the installation."

The above statement and conclusion of the court is unsupported by any testimony or evidence or any inference that can be drawn from the testimony of said Rex Wann.

The above statement and conclusion of the court is subject to no other construction than:

(*a*) That a mechanic employed to perform certain services is irrevocably entrusted with all the discretionary powers relative to his employment; and

(*b*) The employer is without authority to direct the manner in which the services of his employee are to be performed to direct that the employee not perform the same in a manner to constitute a violation of law.

The aforesaid statement and conclusion of the court is unsupported by evidence or authority and in our opinion is so fundamentally erroneous that the mere statement of the conclusion demonstrates its unsoundness.

REASONS FOR GRANTING THE WRIT.

The decision of the court below in the instant case by its aforesaid conclusion, unsupported by authorities, has placed a construction upon Federal Rule 56 (b) and (c) of Civil Procedure holding that:

I.

(*a*) The trial court is empowered and authorized under the aforesaid rule to weigh testimony and determine the credibility of witnesses.

(*b*) That the trial court having weighed the testimony and determined the credibility of witnesses may enter summary judgment pursuant to said rule upon the vague and conflicting testimony of an interested witness.

Said holding is in direct and irreconcilable conflict with the law announced by this Court in *Sartor* v. *Arkansas Natural Gas Corp., supra,* in construing Federal Rules of Civil Procedure, Rule 56 (c), in syllabus 5, 7, 8 and 9, announced the law as follows, to-wit:

"6. Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and no genuine issue remains for trial.

7. The credibility of witnesses and weight to be given their testimony is for jury which may exercise its independent judgment even if such testimony is uncontradicted.

8. That a witness is interested in result of suit is sufficient to require the credibility of his testimony to be submitted to jury as a question of fact.

9. Jury should not be disturbed in the exercise of its function of determining credibility of witnesses and the weight of their testimony except in case of manifest and extreme abuse of such function."

The court in support of syllabus 8, *supra*, cites *Sonnentheil* v. *Christian Morlein Brewing Co.*, 172 U. S. 401, 19 S. Ct. 233, and we quote from 19 S. Ct. 236, as follows:

> "And while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses * * *, the very courts that lay down this rule qualify it by saying, 'The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact'."

The opinion in so holding is also in direct and irreconcilable conflict with the construction the Court of Appeals of the District of Columbia placed upon Federal Rule 56 (c) in *Miller* v. *Miller*, 122 F. 2d 209, wherein the court in construing said rule in syllabus 7, 8 and 10 stated as follows:

> (7) "The purpose of the procedural rule providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings, *and the court is not authorized to try the issue*, but must determine whether there is an issue to be tried. (Italics ours.)
>
> (8) "To proceed to summary judgment under procedural rule, it is not sufficient that the judge may not credit testimony proffered on a tendered issue, but it must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that, conceding its truth, it is without legal probative force.

(10) "To justify summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."

The holding is also in direct and irreconcilable conflict with the law announced by the Court of Appeals of the 5th Circuit in *Whitaker* v. *Coleman*, 115 F. 2d 305, wherein the court in syllabus 1 stated as follows:

"Where liability of automobile owner for deceased's death caused by automobile driver and liability of insurer under liability policy depended upon whether driver used automobile with permission of owner, deceased's administrator's offer of proof that driver had privilege of using automobile, kept keys, and used automobile without objection by owner, presented a genuine issue of fact which entitled administrator to a jury trial on the issue and precluded summary determination against administrator under summary judgment procedure provided by civil procedure rules."

And in the body of the opinion states as follows:

"The invoked procedure, valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial."

The opinion in holding that the weight and credibility of the witness Wann was a matter for the court and presented no issue of fact for the jury is in direct conflict with the uniform decisions of the Supreme Court of Oklahoma in announcing the general principle of law stated in *National Life & Accident Ins. Co.* v. *Robertson*, 180 Okl. 265, 68 P. 2d 796, to-wit:

"It is for the jury, or the trial court upon waiver of jury, to determine the credibility of the various

witnesses, and the weight and value to be given to their testimony."

Clearly the plaintiff, who seeks to recover damages for permanent personal injuries, incapacitating her for the remainder of her life, from the owner of the automobile being driven by Rex Wann, while in the employ of the owner, in a negligent and unlawful manner, presents no sham or feign issue under the above authorities.

The fact the owner seeks to evade liability on the sole theory that the driver was an independent contractor refutes any contention the plaintiff's claim is feigned or a sham, and when coupled with the defendant's admission that the car was unlawfully operated at the time of the accident with its knowledge and permission, clearly presents a genuine issue of fact as to the relationship between the owner and the operator of the automobile for a jury to determine.

The conflict in the above decisions of this Court and the Circuit Court of Appeals of the District of Columbia and the Court of Appeals of the 5th Circuit with the opinion herein in the instant case in holding the trial court, under the aforesaid rule, on motion for summary judgment, is authorized to determine the credibility of interested witnesses and to weigh their testimony is so apparent that a definite decision is vitally important not only to the litigants in the case at bar but to all litigants generally, that uniformity can only be secured by this Court again determining the function and duties of the trial court under the aforesaid federal rule upon motion for summary judgment.

II.

The opinion of the court below in the instant case has decided important questions of local law in irreconcilable conflict with the local applicable decisions of the Supreme Court of Oklahoma and in so deciding has misconstrued Federal Rule 56 (c) of Civil Procedure and is in direct conflict with the decisions of the Supreme Court of Oklahoma and the law announced therein, heretofore cited and quoted from, in the following cases, to-wit:

(a) *Ellis & Lewis* v. *Trimble, supra,* holding that a party performing work for another at the time of injury caused by his negligence places the burden of proof upon the employer to exempt him from liability on the ground the relation of master and servant did not exist.

(b) In *Norton* v. *Harmon, supra,* wherein it is held the fact that a dealer's automobile was one that could not be operated upon the highway for a private purpose without a dealer's license plate attached thereto, was being so operated, presented a question of fact for the jury to determine whether the driver was the agent of the employer.

(c) In *M., O. & G. Ry. Co.* v. *Brown,* 41 Okl. 70, 136 Pac. 117, holding that the employer cannot escape liability through the instrumentality of independent contractor caused by the negligent performance of work when the employment contemplated the doing of an unlawful act, and the injury occurred during the performance of said unlawful act.

See: *Minnetonka Oil Co.* v. *Haviland, supra;*
Huckins Hotel Co. v. *Clampitt, supra;*
Marion Machine Foundry & Supply Co. v. *Duncan, supra.*

(d) *Sheppard* v. *Hall, supra,* and *Coston* v. *Adams, supra,* holding that an oral contract which is vague, indefinite and uncertain presented an issue of fact for the jury to determine whether it created the relation of master and servant or that of an independent contractor.

(e) *Indian Territory Illuminating Oil Co.* v. *Bell, supra,* and *Hulett Lbr. Co.* v. *Bartlett-Collins Co., supra,* holding that the separate and independent acts of several combined to commit wrongful acts presented a question of fact for the jury to determine their liability as joint tort-feasors.

III.

The holding and judgment of the court upon which it based its decision, to-wit:

> "The company had no power of direction or control over Wann in doing the work. It had no authority to direct him to do anything. He was free to do the work in any way he saw fit. The company could neither direct him to road test or refrain from road testing the installation;"

being unsupported by evidence or reasonable inference therefrom, is erroneous.

See: *McNally* v. *Cochran,* 170 Okl. 368, 46 P. 2d 955;
Knox v. *Champlin Refining Co.,* 172 Okl. 396, 45 P. 2d 119;
Gulf, C. & S. F. Ry. Co. v. *Rutledge,* 173 Okl. 245, 47 P. 2d 833.

The above statement of the court being unsupported by a finding of the court or any evidence or inference to be drawn therefrom should be reviewed by *certiorari* in this Court and held to be erroneous.

Settlement of the questions by this Court is primarily in the public interest since it is likely to be presented in

almost any jurisdiction where the question of rules of federal procedure are involved or in any action arising in the various federal courts occurring to an employee wherein the defendant seeks to evade liability upon the theory of the employee being an independent contractor.

Conclusion.

For the foregoing reasons this Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

NEAL E. McNEILL,
1910 First National Building,
Tulsa, Oklahoma,
Counsel for Petitioner.

NEAL E. McNEILL, JR.,
1910 First National Building,
Tulsa, Oklahoma,
Counsel of Record.

APPENDIX.

Appendix "A."

JUDGMENT.

Thirty-first Day, November Term, Tuesday, January 3rd, 1956.

Before Honorable Sam G. Bratton, Chief Judge, Honorable Walter A. Huxman, Circuit Judge, and Honorable A. Sherman Christenson, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Appendix "B."

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT.

The motion of the defendant, Fred Jones Company, an Oklahoma corporation, for summary judgment pursuant to rule 56 (56-c) of the Rules of Civil Procedure, having been presented, and the court being fully advised.

The court finds that the defendant, Fred Jones Company, an Oklahoma corporation, is entitled to a summary judgment as a matter of law.

It is therefore ordered, adjudged and decreed that the defendant's motion for summary judgment be, and the same hereby is granted, that the plaintiff have and recover nothing by their suit, that the defendant, Fred Jones Company, an Oklahoma corporation, go hence without delay, and that

defendant recover its costs and charges in this behalf expended and have execution therefor.

Enter: Dated this 19th day of April, 1955.

Royce H. Savage,
Judge of the United States District Court
for the Northern District of Oklahoma.

Filed April 19, 1955.

Appendix "C."

ORDER DENYING PETITION FOR REHEARING.

Sixty-first day, November Term, Wednesday, February 15th, 1956.

Before Honorable Sam G. Bratton, Chief Judge, Honorable Walter A. Huxman, Circuit Judge, and Honorable A. Sherman Christenson, District Judge.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

Appendix "D."

Federal Court Rule 56 (a), (b) and (c), reads as follows, to-wit:

"56. *Summary judgment.*—(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) *For defending party.* A party against whom a claim, counter-claim is asserted or a declaratory judg-

ment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) *Motion and proceedings thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damges."

Appendix "E."

Section 22.15, Title 47, O. S. A. 1951:

"Every person manufacturing or having a contract to sell new vehicles in this State, shall file a verified application upon a form to be prescribed and furnished by the Commission for a general distinctive number for all new vehicles owned or controlled by such manufacturer or dealer; provided, the Commission shall issue a license to sell such new motor vehicles only for those types of new vehicles for which the applicant has a sales contract or franchise. Provided, that a separate manufacturer's or dealer's license *shall be required for each* separate county within which such manufacturer or dealer has an established place of business and upon payment of a license fee of Twenty-five Dollars ($25.00) there *shall be assigned and issued to such* manufacturer or *dealer* a Certificate of Registration *and two* (2) *identification or number plates, and one* (1) *of which shall be displayed upon each vehicle of such manufacturer or dealer when same is operated, driven, or displayed on any street, road or highway,* in the same manner as

hereinbefore provided for vehicles owned, possessed or operated by other persons. Such a manufacturer or dealer in new vehicles may obtain as many additional identification and number plates as may be desired, upon the payment of the sum of Twenty-five Dollars ($25.00) for each additional set of such plates; *provided that no such identification or number plate issued to any manufacturer or dealer shall be used or displayed upon any secondhand or used vehicle or upon any new vehicle which is used for a service car, or private use, or for hire.* If such person also buys and sells used vehicles, he shall after obtaining his new car dealer's license also obtain a used car dealer's license, the cost of which to him shall be Five Dollars ($5.00) per year. * * *"

Appendix "F."

Summary of the Deposition of Rex Wann.

Was one of the defendants; a general mechanic; operates Creekmore Motor Service with his partner. Was driver of the automobile involved in the accident with Mrs. Hines on January 7, 1954, at Admiral and New Haven (C. Tr. 18). Did not know the owner of the car; Fred Jones Company brought it to him to install an air conditioner. In order to properly install an air conditioner it is necessary to road test them, that is, drive the car on the road (C. Tr. 19). The only place you can road test one where my shop is, is on East Admiral and I was road testing at the time of the accident. Worked for Fred Jones Company from 1950 to 1953. When the car was delivered to me had no license plate of any sort attached (C. Tr. 19). When working for Fred Jones Company we road tested them 4 or 5 times * * *. The general practice after installation of air conditioners is to road test the same. It is almost impossible to get one to run without road testing it. It almost has to be a standard procedure to road test the same after the air conditioner is installed. Had installed

air conditioners in about 20 cars for Fred Jones Company prior to the accident and about 50 afterwards; about 50% had license tags of some kind on them.

On cross-examination: The company would bring these cars to him to have air conditioners installed in them. * * * Was paid on a job basis * * *. Fred Jones Company furnished the air conditioners. He used his own equipment such as drills * * *. He had no written contract with the company. (C. Tr. 21-22)

He was asked the following questions and gave the following answers:

> Did Fred Jones tell you how to install it, or as you put it is there only one way to do it?
>
> There is just one way. They would tell me they wanted a good job.
>
> You do general mechanic work, is that correct?
>
> Well, once and a while I put in a set of rings but very seldom. It is usually tuning up and air conditioning work. * * *

Did not have any written contract with Jones on this installation. (C. Tr. 21)

[redacted]

[redacted]

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IN THE SUPREME COURT OF THE UNITED STATES.

No. .....

MATILDA HINES, *Petitioner,*

vs.

FRED JONES COMPANY, an Oklahoma Corporation, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI.*

Statement of Facts.

The plaintiff was injured through the alleged negligence of Rex Wann, and Fred Jones. Fred Jones admitted that Wann was driving a car owned by Jones, but denied, under oath, that Wann was its agent or employee.

The plaintiff took the deposition of Rex Wann and Mr. Brann, the latter being manager of Fred Jones, and developed all the facts which are pertinent to this appeal.

Facts proven by the plaintiff, which are not in dispute, and which was the basis for the summary judgment, are as follows:

Rex Wann, an automobile mechanic, was a partner in the Creekmore Motor Company. They were independent business men, and as partners operated a general automobile repair business in Tulsa. As such, Wann was a competitor of Fred Jones, who was likewise engaged in the general automobile repair business. Fred Jones sold new cars but did not install air conditioners. Rex Wann did not sell new

cars but did install air conditioners. Fred Jones made arrangements with different garages in Tulsa to install air conditioners in cars that they sold. Among these independent business men that they contracted to do this work was their competitor, Rex Wann.

The installation in this particular car involved in this accident had been made by Wann. At the time of the accident Wann was driving the car owned by Fred Jones, while in the process of installing the air conditioner. The car did not have a license tag on it.

The evidence was clear and undisputed and without contradiction that Rex Wann was: (*1*) An independent business man, (*2*) was paid by the job, (*3*) did work for any person that brought work to his garage or made arrangements for him to work on their car, (*4*) worked whatever hours he, Rex Wann, preferred, (*5*) used his own equipment, (*6*) used own methods of performing work, and (*7*) no control was exercised over him except that the completed job would be satisfactory.

The deposition of Rex Wann was attached to the motion for summary judgment, and after the first hearing, the trial judge gave the plaintiff additional time to secure evidence to substantiate their claim that Wann was an agent of Jones at the time of the accident rather than an independent contractor, and the matter was continued for some three months for that purpose. During that period of time the plaintiff took the deposition of Mr. Brann, manager of Fred Jones. No other evidence was offered.

Thereafter, the motion for summary judgment came on for hearing again, at which time it was sustained.

Reasons for Not Granting Writ.

The evidence was undisputed that Wann was an independent contractor and under the holdings of the Oklahoma Supreme Court the trial judge had no choice but to grant the motion for summary judgment, and the Circuit Court of Appeals had no choice but to affirm this action, which they did unanimously.

It is quite apparent that learned counsel for plaintiff, though repeatedly told by the trial court as well as the Circuit Court of Appeals, have never quite realized that it is incumbent upon them to prove by some competent evidence legal responsibility on the part of Fred Jones.

On page 39 of the transcript filed in the Circuit Court of Appeals the trial judge said:

> "The Court: Well, now, if you want to go around talking about the evidence, that is something else; if you can point out any evidence—any testimony in these depositions which suggest an agency relationship I would be interested in hearing that."

Let us examine the facts as previously stated alongside the opinions of the Supreme Court of Oklahoma, which the Circuit Court was obligated to follow. The evidence of the relationship between Mr. Wann and Fred Jones Company as reported in the Transcript at pages 20 and 21 is as follows:

"Q. Now, as I understand it, they would bring these cars out to you to have the air conditioner installed in them?

A. Yes.

Q. And fifty per cent of the time you would take it back or they would come after the car after it was completed; is that correct?

A. Yes, sir.

Q. How were you paid—on a per job basis or on a monthly salary?

A. Job basis.

Q. Did you use your own equipment—what I mean for the installation?

A. Yes, you have those drills and such as that.

Q. I understand that Fred Jones, Incorporated, furnished the air conditioner, but you used your own equipment to install it?

A. Yes.

Q. Did you have any written agreement with Fred Jones, Incorporated, on this work?

A. No.

Q. Did Fred Jones tell you how to install it, or as you put it there is only one way to do it?

A. There is just the one way. They would tell me they wanted a good job.

Q. What time of night or time of day did this accident happen?

A. About twenty until seven.

Q. About 6:40 p. m.?

A. That's right.

Q. What is your usual working hours at the garage?

A. Well, sometimes I work until midnight, sometimes I go to work at six o'clock in the morning.

Q. What is your usual hours out there?

A. Well, I usually work from about seven to about eight o'clock, I would say.

Q. I believe you stated that you do general mechanic work; is that correct?

A. Well, it is; once in a while I put in a set of rings, but very seldom. It is usually tuneup and air conditioner work.

Q. In other words, you don't work exclusively for Fred Jones?

A. No.

Q. You do other work for other people?

A. Yes.

Q. Did you have any written contract with Fred Jones on this installation?

A. No.

Mr. Cox: That's all.

Mr. Ward: That's all.

Mr. McNeill: I think that's all."

Thus the undisputed evidence in the instant case clearly shows that Mr. Wann was an independent contractor because the Fred Jones Company retained no right to control the manner in which the air conditioning installation was to be achieved. That is, the Fred Jones Company had no right to control the physical details of the work to be done by Mr. Wann. This decisive test is well pointed out in the case of *Sawin* v. *Nease*, 186 Okl. 195, 97 P. 2d 27, 30-31, wherein the court said:

> "The cases discussing the law of independent contractors are almost without number, and usually an argument is easily obtained on the question whether in a given situation, the person in question is a servant or an independent contractor; but when the numerous judicial pronouncements are reduced to their decisive substance it is found that the hub of the entire controversy is whether the employer had the right to control, or purported or attempted to control the manner of the doing of the thing by the alleged servant, which resulted in the injury. If he did have that right, or exercised it regardless of his right to exercise it, then the relationship is that of master and servant, regardless of what any existing written contract may set forth

on its face; if he did not have that right and did not exercise such right, but had only the right to demand specified results, the relationship is that of independent contractor and contractee."

The Oklahoma Supreme Court in the early case of *Barnsdall Refining Co.* v. *The State Industrial Commission,* 163 Okl. 154, 21 P. 2d 749, has set out some of the criteria to be used in determining whether a party is the servant or independent contractor. The *Barnsdall* case has been consistently followed in Oklahoma. *Ellis & Lewis, Inc.,* v. *Trimble,* 177 Okl. 5, 57 P. 2d 244; *Dierks Lumber & Coal Co.* v. *McDaniel,* 188 Okl. 695, 112 P. 2d 1082; *Taylor* v. *Hayes,* (Okla.) 261 P. 2d 599. The *Barnsdall* case states that the following criteria are considered in determining whether a party is an agent or an independent contractor:

"* * * (1) The degree of control exercised by the employer, or the independence enjoyed by the contractor or agent;

"(2) Whether the party is to be paid by the job or is to receive a certain salary by the day, week, or month;

"(3) Whether his employment consists solely in working for this employer;

"(4) The control that is exercised over him in the method and manner of performing the work;

"(5) Whether the agent uses his own equipment, or whether the equipment, if any, so used, is owned and controlled by the owner; and

"(6) The nature of the contract, whether written or oral."

Using these criteria to determine whether the relationship is one of agency or that of an independent contractor, the undisputed evidence in the instant case shows that:

(1) The Fred Jones Company exercised no control over Mr. Wann in the physical details of his work, but merely told him that they expected a good job. (Tr. 20)

(2) The Fred Jones Company paid Mr. Wann by the job. (Tr. 20)

(3) Mr. Wann did not work exclusively for the Fred Jones Company, but did work for other people. (Tr. 21)

(4) The Fred Jones Company exercised no control over Mr. Wann in the method and manner of performing the installation of the air conditioner. (Tr. 20)

(5) Mr. Wann used his own equipment and tools for the installation of the air conditioner. (Tr. 20)

(6) The contract was oral. (Tr. 21)

Therefore, it is seen that under all of these tests, the undisputed facts in the instant case show that Mr. Wann was an independent contractor at the time this accident occurred.

However, assuming, but not admitting, that a presumption of agency was, in fact, raised, the trial court in the instant case specifically found that if there had been such a presumption raised that it had been rebutted by the undisputed evidence in this case. We would like to quote from the transcript of record that part dealing with the arguments had on the motion for a summary judgment (Tr. 37-39):

"The Court: Well, let me interrupt you a moment. Now our question here is whether there will be any genuine issue of fact as to the relationship which

existed between Wann and Fred Jones, at the time this accident occurred. That is, whether there will be any genuine issue of fact as to the circumstances under which Wann had possession of and was driving this car at the time of the occurrence of the accident. If there be any genuine issue of fact of course it would be a jury question that would have to be submitted to the jury. There isn't any dispute about the ownership of the vehicle; Fred Jones owned the vehicle. There isn't any dispute about Wann being the driver of the vehicle at the time the accident occurred. But the question—the ultimate question to be determined is whether Wann was driving the vehicle as the agent——

Mr. McNeill: That is——

The Court: Of Fred Jones, and within the scope of his authority as such agent. Now that is the ultimate question.

Mr. McNeill: That is the ultimate question, and when he is——

The Court: Now then——

Mr. McNeill: Pardon me——

The Court: The depositions that have been taken and have been filed and submitted in connection with this motion for summary judgment establish in my opinion that Wann was an independent contractor. The car was taken to him under an arrangement whereby he would install the air conditioning equipment in the vehicle without any direction on the part of Fred Jones as to the manner or method of installation, without any control over him whatever, except as to the result. And that is the typical independent relationship.

Mr. McNeill: Minus when you don't take into consideration the fact of the presumption—I don't think—in other words, the point I am trying to make, these presumptions——

The Court: These presumptions fall by the way when you get to the facts.

Mr. McNeill: They may be rebutted.

The Court: Well, and the one you are talking about has been.

Mr. McNeill: Of course that is a question in other words I think actually to decide——

The Court: Well now suppose we go and try this case to the jury, suppose we empanel a jury and put on all the evidence and the undisputed evidence in the case demonstrates that Wann had possession of this vehicle under an independent contractor relationship, turned over to him for him to install this air conditioning equipment and return it, just like you may leave your car some place to have air conditioning equipment installed with no supervision, no direction—no employer-employee relationship existing——

Mr. McNeill: Well, I say we have still made——

The Court: I simply have to tell the jury that if there ever was any presumption I tell them it has been overcome by this evidence.

Mr. McNeill: Well, that is what I don't think it has been, your Honor.

The Court: Well now if you want to go around talking about the evidence, that is something else; if you can point to any evidence—any testimony in these depositions which suggests an agency relationship I would be interested in hearing that."

The plaintiff, in her brief, touches lightly upon the proposition that since the car in question was delivered to Mr. Wann without a license displayed thereon that this constituted an unlawful act. To charge a defendant with liability for participating in an illegal act, the courts of Oklahoma, as well as the courts in most sister states, hold that before such illegal act is actionable, there must be some causal connection between the illegal act in question and the injury complained of. In the case of *Marland Refining*

Co. v. *Duffee,* 94 Okl. 16, 220 Pac. 846, the plaintiff brought suit for property damage to his vehicle which was properly parked on a street in Ponca City, Oklahoma. The defendant, by way of answer, set up the absence of a license plate on the plaintiff's car as an illegal act which would bar the plaintiff from recovery. The Supreme Court of Oklahoma in refusing the defendant's argument cites, at page 851 of Pacific Reporter, to-wit:

> "It is a well-established rule of law that one who does an unlawful act is not thereby placed outside the protection of the laws, but that, to have this effect, the unlawful act must have some causal connection with the injury complained of. In accord with this rule it is held by the great weight of authority and the better reasoned cases, that one who sustains injury to his person or property by the negligence of another while using or riding in an unlicensed automobile is not precluded from recovering by reason of the failure to comply with statutes in effect providing that motor vehicles shall be registered, and shall not be operated on the highway unless they are registered, where the failure to register in compliance with the statute had no causal connection with the injury."

The court went on to state since there was no causal connection between the illegal act and the injury complained of, the trial court was correct in refusing to give an instruction in regard to the absence of the license plate. In the instant case, there is no evidence in the Transcript of Record to show any causal connection between the absence of a license plate on the car and the injuries sustained by this plaintiff. The trial court in the hearing on the motion to strike and to dismiss pointed out that there was no causal relationship between the violation of the licensing statute and the injury to the plaintiff as follows (Tr. 29):

"The Court: Now then you make the allegation that this car that Wann was driving did not have a license tag on it, and that driving a car without a license tag constitutes violation of the Statutes of the State of Oklahoma.

Mr. McNeill: That's right.

The Court: Now, my point is, that doesn't have any more to do with the occurrence of this accident—any more to do with the negligent conduct which would give rise to a cause of action against the driver of the vehicle than would the fact that I might have driven my car down this morning without a license tag on it. There is no relationship—there is no proximate cause."

In the case of *Bradley* v. *Chickasha Cotton Oil Co.*, 84 P. 2d 629, the Supreme Court of the State of Oklahoma held that the illegal use of a license standing alone is not sufficient to create the presumption of agency between the owner and driver.

In the *Bradley* case the plaintiff sought to charge the defendant with responsibility for personal injury sustained by him when he was struck by a truck transporting cotton belonging to the defendant company. At the time, the truck was being operated in violation of the Motor Vehicle Law. Plaintiff alleged that this arrangement was illegal and therefore raised a presumption with the driver that owner of the truck were the agents and servants of the defendant. The trial court sustained a demurrer to the plaintiff's evidence, thus holding that mere proof of the violation of the Motor Vehicle Law was not sufficient to raise a presumption of agency between the defendant shipper and the driver and/or the owner of the truck. The Supreme Court of Oklahoma affirmed the trial court, stating there was no evidence to indicate that the driver of the truck was other than an

independent contractor, and that evidence of violation of the Motor Vehicle Law becomes material on the question of agency only if there is independent evidence of such relationship.

The complainant cites *Norton* v. *Harmon,* 133 P. 2d 206, which is distinguishable from the instant case insomuch as in that case there was a sharp conflict of evidence as to whether or not the defendant Norton at the time of the accident was engaged on a mission for his company of which he was president, or whether he was engaged upon a purely personal mission. The court properly recognized that this sharp conflict in evidence presented a question of fact to be determined by the jury.

In view of the evidence and authority cited above, it is submitted that the trial court correctly sustained the Fred Jones Company's motion for summary judgment, and that the trial court's action and the Circuit Court of Appeals' decision should be affirmed.

Since the evidence in the instant case was undisputed, under the Oklahoma law, it became a question of law for the trial judge to decide whether there was an agency relationship or an independent contractor relationship. Such was the holding of the Oklahoma Supreme Court in the case of *Cook* v. *Knox,* 273 P. 2d 865.

We are not interested in the law in other states, but the law in Oklahoma is that the ownership of the automobile does not raise a presumption of agency.

In *Randolph* v. *Schuth,* 90 P. 2d 880, the Supreme Court of Oklahoma held, in syllabus 1:

> "Where injury occurs by reason of the alleged negligent operation of an automobile by one other than the

owner, the fact that the operator is in charge of the automobile with the owner's consent, raises no presumption of agency."

See also, *Jamar* v. *Brightwell*, 19 P. 2d 366, *et al.*

We of course have no quarrel with the law laid down in the two cases from the United States Supreme Court, but it is quite apparent that the facts of these cases, and the law peculiarly applicable to them, have no connection whatsoever with the case at bar.

For example, in the case of *Sartor* v. *Arkansas Natural Gas Corp.*, four syllabi of which are cited on pages 12 and 13 of the petitioner's writ, syllabus 3 and 10 which are copied here indicate very clearly the difference between the two cases. After all, if a jury disregarded the testimony of certain experts at one time, it certainly could not be assumed that the trial court could accept the testimony of these experts as conclusive on the question of damages:

"3. Where undisputed facts leave the existence of a cause of action depending on questions of damage, summary judgment, if warranted upon any showing, should be entered only upon such evidence as a jury would not be at liberty to disbelieve and which would require a directed verdict for moving party. Federal Rules of Civil Procedure, Rule 56(c), 28 U. S. C. A., following Section 723c.

"10. Affidavits of interested experts, whose opinions jury refused to follow at previous trial, that market price at well of gas produced under mineral leases providing for calculation of gas royalties at the rate of market price and not less than 3c per m. c. f. did not exceed 3c, stipulation showing that 10 per cent. of royalty gas produced in same area under similar leases was paid for at rate of 4c per m. c. f. and exhibits did not conclusively establish that market price of gas at

well did not exceed 3c so as to justify summary judgment that lessors who had received 3c per m. c. f. for royalty gas were not entitled to additional royalties. Federal Rules of Civil Procedure, Rule 56, 28 U. S. C. A., following Section 723c."

The trial court and the Circuit Court of Appeals recognize that if there was a genuine issue of fact the motion for summary judgment should be overruled, but the trial court kept insisting to plaintiff's counsel that they point out what facts they had proven or had available that would make a genuine issue of fact.

There was no proper answer to this question, but counsel for plaintiff kept insisting that if there had been a certain type of tag on the car, which there was not, then that tag would have raised a presumption of agency, which statement in our judgment was not supported by Oklahoma law. They were relying upon a case from Oregon and from New York State which had statutes making the laws of those two states different from those of Oklahoma.

We most respectfully insist that criticism of the opinion of the United States Circuit Court of Appeals in which they refer to that portion in which it is said, "the company had no power of direction or control over Wann in doing the work. It had no authority to direct him to do anything. He was free to do the work in any manner he saw fit. The company did neither direct him to road test or refrain him from road testing the installation," was wholly unsupported by the evidence or reasonable inference therefrom, is quite uncalled for.

We call attention to the fact that this was a unanimous decision of the Circuit Court of Appeals. So the trial judge,

and three appellate judges, or four judges, have passed upon this matter.

Each, we must presume, was honestly and conscientiously trying to state the facts and we do not believe that the inference that the facts were misstated or an improper conclusion drawn is borne out by the record.

Referring to the deposition of Mr. Brann, manager of Fred Jones, on pages 22, 23, 24, and 25 of the transcript, 23, Mr. Brann stated that they used several different air conditioning people on installations, they do not install them, he knows nothing about them, he only sells them, arrangements with Mr. Wann was made by a contract with him, every job is an individual job, not only with him but with several other garages, they get a figure on what they are going to charge on a contract basis, more specifically on 24 when asked a question about air conditioners he answered, "A. I don't know, I'm not an air conditioning man. You are getting a little too technical for me there because I don't know even where the lines run, I just sell them."

Referring to the testimony of Mr. Wann on pages 20 and 21 of the transcript you will find that he and another man were partners in the Creekmore Motor Company. That at the time of the accident that the sign and telephone was listed under Creekmore Motor Service. That he was paid on a job basis, that he used his own materials, worked his own hours, he was not told by Fred Jones how to install them, except they wanted a good job, that he worked different hours, that he is a general mechanic, does work for the public.

We most respectfully insist that under this evidence, the trial court and the Circuit Court of Appeals were cer-

tainly warranted in the statement that they made in their opinion.

This situation is no different than if the reader or the writer of this brief were to take his automobile to Mr. Wann to have him install an air conditioner. Mr. Wann is engaged as a general automobile mechanic, with a place of business in Tulsa, Oklahoma, and is ready and willing at all times to install air conditioners for either the reader or the writer of this brief, Fred Jones, or any other customer that cares to make arrangements with him. He is a pure and simple independent contractor, and in this instance there is no more liability upon Fred Jones than there is upon either the reader or the writer of this brief if we were to deliver our car to Rex Wann for the purpose of doing any type of work upon our automobile.

And if Wann be an interested witness, he would be interested on behalf of the plaintiff recovering a judgment against Fred Jones in order that he be completely or partially absolved of liability to the plaintiff.

We most respectfully insist that the writ be denied and the unanimous opinion of the United States Circuit Court of Appeals for the Tenth Circuit be affirmed.

TRUMAN B. RUCKER,
608 Wright Bldg.,
Tulsa, Oklahoma,
Attorneys for Respondent.

APPENDIX.

Appendix A.

DEPOSITION OF REX WANN (Tr., pp. 18-21).

In the District Court of Tulsa County, Oklahoma. Matilda Hines, Plaintiff, *vs.* Fred Jones Company, an Oklahoma Corporation, *et al.*, Defendants, No. 87060.

Direct Examination by N. E. McNeill, Jr.

Rex Wann, one of the defendants, a general mechanic, with his then partner, Louis Jones, leased and operated Creekmore Motor Service; was the driver of the Lincoln automobile involved in the accident with Mrs. Hines on January 7, 1954, at Admiral and New Haven.

Did not know the owner of the car; Fred Jones Company brought it to him to install an air conditioner in it; did not know the name of the person that brought it.

The Fred Jones Company brought the air conditioner; prior to the accident he had installed an air conditioner in about 20 cars and in about 50 cars since; nothing had ever been said about delivering the cars back to Fred Joues Company, that is to their possession. I figured about fifty per cent of the time I would take the car back and they would bring me back; other times they would come and get it.

In installing an air conditioner you have to pull the crank shaft, pull the generator loose, take the fan off, put the condenser in the front, run lines under the car, cut holes and vents in the back and install the evaporator in the trunk. There is just one way to install that unit. About ninety per cent of the time, there being about 200 pounds in a unit, there is some rattle or something in the back. The lines or fan belt might be loose. I put them in for Fred Jones; they leave the car over night and we recheck them again the next day. We recheck them by leaving them run a while.

We had a factory man out the other day; had five or six units that wasn't getting cold enough and had to drive them on the road to set them. It is impossible to set them with a gauge. In order to do the proper installation it is necessary to road test them, that is drive them on the road.

I was road testing the car on East Admiral Place, the only place you can road test one is on Admiral Place where my shop is and I was road testing it at the time of the accident. When I worked for Lincoln-Mercury I used to road test them on Riverside Drive or on 13th Street. I worked for Lincoln-Mercury from 1950 to 1953. The Lincoln-Mercury is the Fred Jones Company. When the car was delivered to me it had no license plate of any sort attached.

The speedometer was not hooked up or anything. Of the 20 cars for Fred Jones Company that he had installed air conditioners in prior to the accident about fifty per cent of them had license tags of some kind on the same. The road testing after the installation of an air conditioner is what might be called a standard procedure. When working for Fred Jones Company he installed air conditioners.

When working for Fred Jones Company we would road test them four or five times and the service manager would have to try them out to see if they were cold enough. The general practice after installing an air conditioner is to road test the same. It is almost impossible to get one to run without road testing the same. It almost has to be a standard procedure to road test the car after the air conditioner is installed.

Cross-Examination by Mr. Ward.

He and Louis Jones were partners and leased the Creekmore Motor Company building. They operated on a fifty-fifty basis.

Redirect Examination by N. E. McNeill, Jr.

At the time of the accident the sign and telephone was listed under Creekmore Motor Service.

Cross-Examination by Mr. Cox.

Q. Now as I understand it, they would bring these cars out to you to have the air conditioner installed in them? A. Yes.

Q. And fifty per cent of the time you would take it back or they would come after the car after it was *completes;* is that correct? A. Yes, sir.

Q. How were you paid—on a per job basis or on a monthly salary? A. Job basis.

Q. Did you use your own equipment—what I mean for the installation? A. Yes, you have those drills and such as that.

Q. I understand that Fred Jones, Incorporated, furnished the air conditioner, but you used your own equipment to install it? A. Yes.

Q. Did you have any written agreement with Fred Jones, Incorporated, on this work? A. No.

Q. Did Fred Jones tell you how to install it, or as you put it there is only one way to do it? A. There is just *vhe* one way. They would tell me they wanted a good job.

Q. What time of night or time of day did this accident happen? A. About twenty until seven.

Q. About 6:40 p. m. A. That's right.

Q. What is your usual working hours at the garage? A. Well, sometimes I work until midnight, sometimes I go to work at six o'clock in the morning.

Q. What is your usual hours out there? A. Well, I usually work from about seven to about eight o'clock, I would say.

Q. I believe you stated that you do general mechanic work; is that correct? A. Well, it is; once in a while I put in a set of rings, but very seldom. It is usually tuneup and air conditioner work.

Q. In other words, you don't work exclusively for Fred Jones? A. No.

Q. You do other work for other people? A. Yes.

Q. Did you have any written contract with Fred Jones on this installation? A. No.

Mr. Cox: That's all.

Mr. Ward: That's all.

Mr. McNeill: I think that's all.

Appendix B.

DEPOSITION OF C. C. BRANN.

Taken January 20, 1955. (Tr., pp. 22-25.)

Appearances: For the plaintiff, Mr. *Neil* McNeill. For the defendants, Fred Jones Company, Mr. Gurney Cox.

Direct Examination by Mr. McNeill.

Is the manager of the Fred Jones Company, Tulsa Oklahoma.

The company was the owner of the automobile involved in the accident. It has a franchise and license from Oklahoma Tax Commission to sell Lincoln cars.

This car was not a second hand car or used car or used for service car or for hire or for public or private purposes but was a new car kept for sale. Every year it receives dealers' license plates from the Tax Commission.

Q. Was this automobile listed with the Tax Commission? A. Not at that time.

Q. Not at that time. When are these automobiles listed with the Tax Commission? A. When we sell them.

Did not know whether a dealer's plate was on the automobile at the time of the accident. If there was a license plate on the car it would have been none other type of license than a dealer's license plate.

He did not know the arrangements in this particular instance made with Rex Wann about installation of air conditioner. We use several different air conditioning people on installations.

Q. Let me try to clarify that question a little. What I mean, if a customer, or a prospective customer walks in

here and he would like a '54 '55 certain style Mercury, a certain style with certain accessories, including an air conditioner in it, is that the only time you install them, or do you install them for future owners from what you might say stock? A. We stock ours with air conditioning. Yes, we have several in stock right now.

The installation in this car was in a car that was for sale. Knew Mr. Wann personally; he worked for Fred Jones Company from May 10, 1950, to February 4, 1953.

Arrangements with Mr. Wann was that they made a contract with him. "That is, every job is an individual job, not only with him but with several others." We get a figure of what they are going to charge us on a contract basis. "I don't know what this particular job." Did not know what arrangements were made about taking the car to and from Wann's place of business. Usually the car and the air conditioner is sent to the people that install it. Sometimes we pick them up after installation and sometimes they bring them back to us. I don't know in this particular case.

Q. Do you install air conditioners here in your own garage? A. Well, we have, but we haven't in the last couple of years. You have to have a licensed man to do that and we don't have one at the present time.

Q. You mean, that is licensed by the City? A. The City, I guess.

Q. I didn't know whether it was by the City or the Company that puts out the air conditioner. A. I think it is the City.

I am not familiar with the practice of road testing the automobile after an air conditioner has been installed.

He was asked the following question and gave the following answer:

That is, do you know that the practice takes place and that it is done?

It isn't necessary.

At their garage the only time they road test a car is before they deliver it. It is not necessary to road test a car for air conditioning.

Q. If there was a defect in the installation, how would you determine that before it was delivered? A. It wouldn't work.

Q. How would you determine it? A. Well, if you turn on the air conditioner, and the car doesn't have to be running—I mean rolling—your motor has to be running, and if it won't put out the cold air, it isn't working.

Q. And the lines run from the compressor to the coils in the trunk, and if those lines are so installed that in the turning of a car say for instance, they might be pinched, that would cause a defective operation of it. A. Well, I don't know. I am not an air conditioning man. You are getting a little too technical for me there, because I don't even know where the lines run, I just sell them.

Q. Do you know as a matter of fact, that it is common practice among companies that install air conditioning units in automobiles, to road test the automobile after the air conditioning unit has been installed? A. I can't answer that.

Q. In other words, you don't know one way or another? A. No, I don't.

Did not know if it was the practice of Mr. Wann to road test the automobile after installation or whether any orders were given to him.

He imagined that Mr. Hargrave or Mr. Nelson dealt with Mr. Wann. They were employees of the company.

Q. But to your knowledge there were never any instructions given to Mr. Wann not to road test or drive the automobile? A. Well, I don't know because——

Q. I said, to your knowledge. A. No. I see no reason for it.

Appendix C.

PROCEEDINGS, April 12, 1955. (Tr., pp. 27, 28-31.)

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The Court: Isn't this your question here: Fred Jones turned this automobile over to Wann, to have an air conditioner installed, and according to the allegations of your complaint in connection with the installation of this air conditioner it was necessary for Wann to drive the car for the purpose of testing the installation.

Mr. McNeill: That's right, as contemplated by the parties.

The Court: And while Wann was driving the car he had a collision resulting from negligence on his part—a collision with your car; and you seek to recover against Fred Jones on the theory that at the time the car was driven by Wann he was acting as the agent of Fred Jones.

Mr. McNeill: As the agent and servant and in other words, that the fact that the violation of this——

The Court: Now then you make the allegation that this car that Wann was driving did not have a license tag on it, and that driving a car without a license tag constitutes violation of the statutes of the State of Oklahoma.

Mr. McNeill: That's right.

The Court: Now my point is, that doesn't have any more to do with the occurrence of this accident—any more to do with the negligent conduct which would give rise to a cause of action against the driver of the vehicle than would the fact that I might have driven my car down this morning without a license tag on it. There is no relationship—there is no proximate cause.

Mr. McNeill: Your Honor has missed the point that I am trying to make which is that this is a pertinent allegation, if not on the question of negligence, as tending to prove the agency relationship.

The Court: Well how could it tend to establish an agency relationship? The fact that there is no tag on this car.

Mr. McNeill: Because in other words you have—in other words, a joint combination to commit an unlawful act—in other words, that is really—in other words as I cite those first two cases—that was the question they were concerned with. Of course it was dicta in——

The Court: In both of those cases you have a situation where the owner of the truck didn't have a permit to operate the truck over the highways of the state in conformity with the Motor Carrier Act, and the owner of the vehicle then entered into an arrangement with the party who did have a permit, to operate it under that party's permit.

Mr. McNeill: That is the first case—the Bradley case.

The Court: Now in that situation you do have an arrangement pertaining to an unlawful act, which might have some bearing on the question of agency. In other words you have a truck and you don't have a permit, you can't operate it, and you make arrangements for it to be operated under a permit that I have, why you do have some evidence there which perhaps might tend to establish a master and servant relationship. But here the question of whether this automobile had a license tag on it or whether it was covered with license tags would not have anything to do with the relationship between these parties.

Mr. McNeill: It has the same relationship Your Honor in the Marion case, it was just the reverse; if you recall under the Bradley case they were operating under a permit owned by the Cotton Seed Oil Company; in the Marion case the machinery was being trucked up without a permit at all—had no permit, and they sought to bring it in in that case, and the court in that case, well the language of the court, they didn't let it go in, but they said, it should not go in because there was no other evidence to show master and servant relationship.

The Court: Well is that the only point you have on this question?

Mr. McNeill: Well of course since Your Honor has evidently repudiated my theory on the question of negligence I still think it is a proper allegation to be contained in a petition and relied upon at the time of trial in regard to the other evidence. In other words, after the evidence—at the proper time in other words I think we can show that this will have a bearing—taken in connection with the other evidence on whether there is an agency—tending to prove an agency relationship—a master and servant relationship as between Fred Jones, and Wann.

The Court: Well, I don't think so.

Appendix D.

PROCEEDINGS, April 18, 1955. (Tr., pp. 33, 37-39.)

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The Court: Well let me interrupt you a moment. Now our question here is whether there will be any genuine issue of fact as to the relationship which existed between Wann and Fred Jones, at the time this accident occurred. That is, whether there will be any genuine issue of fact as to the circumstances under which Wann had the possession of and was driving this car at the time of the occurrence of the accident. If there be any genuine issue of fact of course it would be a jury question that would have to be submitted to the jury. There isn't any dispute about the ownership of the vehicle; Fred Jones owned the vehicle. There isn't any dispute about Wann being the driver of the vehicle at the time the accident occurred. But the question —the ultimate question to be determined is whether Wann was driving the vehicle as the agent——

Mr. McNeill: That is——

The Court: Of Fred Jones, and within the scope of his authority as such agent. Now that is the ultimate question.

Mr. McNeill: That is the ultimate question, and when he is——

The Court: Now then——

Mr. McNeill: Pardon me——

The Court: The depositions that have been taken and have been filed and submitted in connection with this motion for summary judgment establish in my judgment that Wann was an independent contractor. The car was taken to him under an arrangement whereby he would install air conditioning equipment in the vehicle without any direction on the part of Fred Jones as to the manner or method of installation, without any control over him whatever except as to the result. And that is the typical independent relationship.

Mr. McNeill: Minus when you don't take into consideration the fact of the presumption—I don't think—in other words, the point I am trying to make, these presumptions——

The Court: These presumptions fall by the way when you get to the facts.

Mr. McNeill: They may be rebutted.

The Court: Well, and the one you are talking about has been.

Mr. McNeill: Of course that is a question in other words I think actually to decide——

The Court: Well now suppose we go and try this case to the jury, suppose we empanel a jury and put on all the evidence and the undisputed evidence in the case demonstrates that Wann had possession of this vehicle under an independent contractor relationship, turned over to him for him to install this air conditioning equipment and return it, just like you may leave your car someplace to have air conditioning equipment installed with no supervision, no direction—no employer-employee relationship existing——

Mr. McNeill: Well I say we have still made——

The Court: I simply have to tell the jury that if there

ever was any presumption I tell them it has been overcome by this evidence.

Mr. McNeill: Well, that is what I don't think it has been, Your Honor.

The Court: Well now if you want to go around talking about the evidence, that is something else; if you can point to any evidence—any testimony in these depositions which suggests an agency relationship I would be interested in hearing that.

Mr. McNeill: Well in other words I will put it this way: I'm not going to point to any testimony in this from a disinterested witness that is going to refute it; I point to this: I say a presumption has been raised and I don't believe there is sufficient testimony here to refute that presumption. I believe if the case went on for trial on just what has been—if we had, just as far as the agency relationship was concerned, on just the depositions, that are on file here coupled with the admission of ownership of the automobile, that the Court would be in error in saying that the presumption had been refuted.

The Court: Well if I am going to be in error in that respect I might as well be now, because that is an error that I am going to have to ultimately commit.

(Tr., pp 42-43) The Court: Well, I was of the opinion that you were very wide of the mark on that proposition. I couldn't see how it would have any bearing on the agency question. And I am satisfied that there is no genuine issue of fact with respect to the relationship of the parties, that Wann was an independent contractor and that Fred Jones has no liability. And I am going to sustain the motion for summary judgment.